

UNITED STATES DISTRICT COURT  
WESTERN DISTRICT OF WASHINGTON  
AT TACOMA

JOANN LEDOUX,

Plaintiff,

v.

OUTLIERS, INC. (d/b/a THESIS, THESIS  
NOOTROPICS, FIND MY FORMULA, and  
FORMULA); DANIEL FREED; MATT  
RUBIN; BRAND NUTRACEUTICALS,  
INC. (d/b/a BRAND NUTRA); BRAND  
PACKAGING GROUP, INC. (d/b/a  
BRANDNUTRACEUTICALS); and John  
and JaneDoes 1-5,

Defendants.

Case No. 3:24-cv-05808-TMC

ORDER DENYING MOTION TO DISMISS

**I. INTRODUCTION**

Between March and September 2021, Plaintiff Joann LeDoux, a nurse in a military hospital, purchased nootropic supplement kits from Defendant Outliers, Inc. (doing business as Thesis or Thesis Nootropics). The company promised that the supplements supported cognitive function, claiming they were a natural alternative to stimulant-based medications like Adderall. But LeDoux alleges that the products actually contained amphetamines, a class of stimulants, and other ingredients that Thesis failed to disclose. When LeDoux was subject to a routine drug screening by the military, she tested positive for amphetamines. She alleges that the Thesis

1 supplements are the probable source. Because of the positive drug screen, LeDoux was  
2 ultimately removed from her position. She lost access to her military benefits and both her  
3 mental and physical health deteriorated. And, after discontinuing the supplements, she claims she  
4 suffered severe withdrawal symptoms from the amphetamines and other undisclosed ingredients.

5 LeDoux sued Defendant Thesis, as well its corporate leadership, Defendants Daniel  
6 Freed and Matthew Rubin. Dkt. 1. She also sued the companies Thesis partnered with to  
7 manufacture and package their product—Defendants Nutraceuticals and Brand Packaging  
8 Group. *Id.* Defendants moved to dismiss, and the Court partially granted the motion, providing  
9 LeDoux leave to amend. Dkt. 39. LeDoux filed an amended complaint. Dkt. 45. She brings  
10 claims under Washington common law, the Washington Consumer Protection Act (CPA), and  
11 the Washington Product Liability Act (WPLA) for 1) negligence; 2) unfair trade practices; 3)  
12 failure to warn; 4) design and manufacturing defect; 5) breach of warranty; and 6)  
13 misrepresentation and fraud. *Id.*

14 Defendants Nutraceuticals and Brand Packaging Group (“the Brand Nutra Defendants”)  
15 moved to dismiss or strike portions of LeDoux’s amended complaint, claiming that she lacks  
16 standing to assert injuries caused by the undisclosed ingredients and arguing that punitive  
17 damages are unavailable for her claims. Because LeDoux has adequately pled injury-in-fact and  
18 a decision on the availability of punitive damages is premature, the Court DENIES the motion to  
19 dismiss. Dkt. 62.

## 20 21 **II. FACTUAL BACKGROUND**

22 Joann LeDoux lived in Tacoma, Washington from June 2018 through March 2023.  
23 Dkt. 45 ¶¶ 1, 82. LeDoux was an Army Nurse, specifically a Certified Registered Nurse  
24 Anesthetist, at Joint Base Lewis-McChord. *Id.* ¶¶ 82–83. LeDoux worked “long” hours and

1 sometimes “struggled with concentrating, remaining focused, alert, and awake during and after  
2 surgery.” *Id.* ¶ 84. While dealing with these challenges at work, LeDoux saw several  
3 advertisements from the Thesis Defendants on social media. *See id.* ¶ 85. The advertisements  
4 were for Thesis’s Formula Nootropic Supplements. *Id.* The advertisements represented that the  
5 supplements were a “safe, all-natural, [] better alternative” to prescription stimulants, such as  
6 Adderall. *Id.* LeDoux read the published ingredients list and decided to purchase the  
7 supplements. *Id.* LeDoux paid for the first month of a monthly subscription containing four  
8 packs of different Formula Nootropic Supplements. *Id.* ¶¶ 88, 90. She purchased the supplements  
9 eight more times. *Id.* ¶ 90. LeDoux began the subscription around March 18, 2021 and canceled  
10 her monthly subscription in late September or early October 2021. *Id.*

11 As part of her role at the Army Medical Center on Joint Base Lewis-McChord, LeDoux  
12 was subject to random drug screenings for controlled substances consumed without a valid and  
13 current prescription. *Id.* ¶¶ 100–01. In compliance with this policy, LeDoux submitted a urine  
14 sample on August 16, 2021. *Id.* ¶ 104. LeDoux’s drug screen tested positive for the presence of  
15 amphetamines. *Id.* ¶ 106.

16 The military began an investigation into LeDoux’s drug screen results. *See id.* ¶¶ 106,  
17 110. As LeDoux explains in her complaint, “[w]hen a service member tests positive on a military  
18 urinalysis for a substance that is not facially illicit and for which a member could be authorized  
19 to take based on a prescription, the Army appoints what is known as a Medical Review Officer  
20 (‘MRO’).” *Id.* ¶ 107. The MRO asks about prescriptions not included in military records. *Id.*  
21 ¶¶ 108–09. LeDoux provided a list of over-the-counter substances she was taking then. *Id.* ¶ 112.  
22 But, without a prescription for amphetamines, she could not explain the cause of her positive  
23 result. *See id.*

1 Because LeDoux could not furnish a prescription for amphetamines, she was subject to a  
2 military criminal trial. *Id.* ¶ 120. Ultimately, LeDoux lost her eligibility for a promotion from  
3 Major to Lieutenant Colonel, was “administratively flagged,” and “made to leave the military  
4 before the expiration of her mandatory retirement date.” *Id.* ¶¶ 127–28. Consequently, LeDoux is  
5 “suffering the loss of a full pension from the US Military,” and is “losing millions in bonuses,  
6 pay, . . . and other military benefits.” *Id.* ¶ 128. She was forced to participate in an “Impaired  
7 Provider Program” at the military hospital where she worked and was directed to attend the  
8 Army Substance Abuse Program. *Id.* ¶ 135. She had her security clearance revoked. *Id.* ¶ 136.  
9 She fears that her state license to work as a Certified Registered Nurse Anesthetist will be  
10 revoked. *Id.* ¶ 137. And LeDoux was “titled and indexed in the National Crime Information  
11 Center (NCIC) database following the military law enforcement probable cause decision for  
12 wrongful use of a controlled substance.” *Id.* ¶ 133.

13 Upon discontinuing the supplements, LeDoux alleges she “suffered physiological  
14 withdrawal effects[,]” such as “depression combined with cravings and dependency symptoms,  
15 including that she was unable to stay awake, alert, or mentally present, despite ingesting copious  
16 amounts of caffeine.” *Id.* ¶ 130. LeDoux was diagnosed with severe clinical depression and  
17 suicidal ideation, and she still has post-traumatic stress disorder. *Id.* ¶ 131. Because of her  
18 custody arrangement, which requires she continue her military service, she may be forced to  
19 relinquish custody of her children. *Id.* ¶ 132.

20 On September 25, 2024, LeDoux sued Defendant Outliers, Inc., (doing business as  
21 Thesis, Thesis Nootropics, Find My Formula, and Formula), as well as Thesis’s CEO Daniel  
22 Freed and Director of Supply Chain Matthew Rubin. Dkt. 1. LeDoux also sued the Brand Nutra  
23 Defendants, alleging that they “assist with the manufacture and packaging” of the Thesis  
24

1 nootropic supplements. *Id.* at 10. These Defendants include Brand Nutraceuticals, Inc. and Brand  
2 Packaging Group, Inc. *Id.* at 2.

3 LeDoux alleges that the product contained amphetamines, despite claiming to be an  
4 alternative to traditional amphetamine-based medications (such as Adderall). *Id.* at 19. She  
5 alleges that the Thesis Formula Nootropic Supplement is “(a) wrongfully distributed, marketed,  
6 and sold for human consumption without the required premarket verification of safety; (b)  
7 contained ingredients and drugs obtained from outside the U.S.; (c) contained pharmaceuticals;  
8 and (d) caused dependence, addiction, and withdrawal in regular users.” *Id.* at 27. LeDoux  
9 included a letter sent by the Food and Drug Administration (FDA) to Defendant Brand Group  
10 Packaging. *Id.* at 7; *see* Dkt. 1-2. The letter was sent following an inspection of the facilities that  
11 “revealed significant violations” of the FDA’s requirements for manufacturing, packaging,  
12 labeling, and holding dietary supplements. Dkt. 1-2 at 1.

13 LeDoux brings claims under Washington common law, the Washington Consumer  
14 Protection Act (CPA), and the Washington Product Liability Act (WPLA) for negligence; unfair  
15 trade practices; failure to warn; design and manufacturing defect; breach of warranty; and  
16 misrepresentation and fraud. Dkt. 45 ¶¶ 144–97. Defendants moved to compel arbitration, or, in  
17 the alternative to dismiss. Dkt. 14. The Court denied the motion to arbitrate and partially granted  
18 the motion to dismiss with leave to amend. Dkt. 39. LeDoux amended her complaint, adding  
19 allegations based on information gathered in early discovery. Dkt. 45. LeDoux claims that the  
20 Formula Supplements contained New Dietary Ingredients (NDIs) not listed in the ingredients.  
21 *See id.* ¶ 60. Some of these ingredients have not been verified as safe for human consumption. *Id.*  
22 ¶¶ 68, 70. Others have been identified “as a drug that is possibly marketed outside the United  
23 States” but not approved for use as a drug in the country. *Id.* ¶¶ 64–65. LeDoux alleges that, had  
24 she known of the contents, she would not have purchased the product. *Id.* ¶ 98.

1 The Brand Nutra Defendants moved to dismiss the amended complaint. Dkt. 62. The  
 2 Thesis Defendants joined the motion. Dkt. 76. The Brand Defendants argue that LeDoux lacks  
 3 standing to allege harm because of the NDIs found in the Formula supplements. Dkt. 62 at 3–5.  
 4 They also argue that punitive damages for Plaintiff’s claims under the CPA and WPLA are  
 5 prohibited because they are not authorized by statute. *Id.* at 6. They request that either the claims  
 6 be dismissed under Rule 12(b)(1) or stricken under 12(f). *Id.* at 5. LeDoux responded. Dkt. 79. In  
 7 reply, Defendants raised a new preemption argument, asserting that Plaintiff’s claims sound in  
 8 Food, Drug, and Cosmetics Act (FDCA) violations and are preempted because the FDA has sole  
 9 authority to enforce the FDCA. *Id.* at 3–5. The briefing is complete, and the motion is ripe for the  
 10 Court’s consideration. Oral argument is unnecessary.

### 11 III. LEGAL STANDARD

#### 12 A. Motion to Dismiss

13 A Rule 12(b)(1) motion seeks dismissal of a claim for lack of subject matter jurisdiction.  
 14 *See* Fed. R. Civ. P. 12(b)(1). Such challenges may be either “facial” or “factual.” “A ‘facial’  
 15 attack accepts the truth of the plaintiff’s allegations but asserts that they ‘are insufficient on their  
 16 face to invoke federal jurisdiction.’” *Leite v. Crane Co.*, 749 F.3d 1117, 1121 (9th Cir. 2014)  
 17 (quoting *Safe Air for Everyone v. Meyer*, 373 F.3d 1035, 1039 (9th Cir. 2004)). “A ‘factual’  
 18 attack, by contrast, contests the truth of the plaintiff’s factual allegations, usually by introducing  
 19 evidence outside the pleadings.” *Id.* When, as here, the Court responds to factual attacks on  
 20 subject matter jurisdiction, plaintiffs “must present ‘affidavits or any other evidence necessary to  
 21 satisfy [their] burden of establishing that the court, in fact, possesses subject matter  
 22 jurisdiction.’” *Edison v. United States*, 822 F.3d 510, 517 (9th Cir. 2016) (alteration in original)  
 23 (quoting *Colwell v. Dep’t of Health & Hum. Servs.*, 558 F.3d 1112, 1121 (9th Cir. 2009)). “Once  
 24 the moving party has converted the motion to dismiss into a factual motion by presenting

1 affidavits or other evidence properly brought before the court, the party opposing the motion  
 2 must furnish affidavits or other evidence necessary to satisfy its burden of establishing subject  
 3 matter jurisdiction.” *Savage v. Glendale Union High Sch., Dist. No. 205*, 343 F.3d 1036, 1039  
 4 n.2 (9th Cir. 2003).

#### 5 **B. Motion to Strike**

6 A court “may strike from a pleading an insufficient defense or any redundant, immaterial,  
 7 impertinent, or scandalous matter.” Fed. R. Civ. P. 12(f). “In deciding a Rule 12(f) motion to  
 8 strike, a court should not resolve disputed and substantial factual or legal issues.” *In re Amazon*  
 9 *Serv. Fee Litig.*, 705 F. Supp. 3d 1255, 1263 (W.D. Wash. 2023) (citing *Whittlestone, Inc. v.*  
 10 *Handi-Craft Co.*, 618 F.3d 970, 973–75 (9th Cir. 2010)). “The function of a [Rule] 12(f) motion  
 11 to strike is to avoid the expenditure of time and money that must arise from litigating spurious  
 12 issues by dispensing with those issues prior to trial[.]” *Id.* (citing *Whittlestone Inc.*, 618 F.3d at  
 13 973). Rule 12(f) motions “are generally disfavored because the motions may be used as delay  
 14 tactics and because of the strong policy favoring resolution on the merits.” *Id.* (citation omitted).  
 15 The burden falls on the moving party and the court should view the pleading in the light most  
 16 favorable to the nonmoving party. *Polaris PowerLED Techs., LLC v. Nintendo Co.*, 623 F. Supp.  
 17 3d 1132, 1136 (W.D. Wash. 2022) (citations omitted).

18 “Ordinarily, a motion to strike will not be granted unless ‘the matter has no logical  
 19 connection to the controversy at issue and may prejudice one or more of the parties to the suit.’”  
 20 *Id.* (quoting *N.Y.C. Emps. Ret. Sys. v. Berry*, 667 F. Supp. 2d 1121, 1128 (N.D. Cal. 2009)).  
 21 “[A]llegations that provide background information, historical material, ‘or other matter of an  
 22 evidentiary nature will not be stricken unless unduly prejudicial to [the moving party].” *Id.*  
 23 (quoting *Erhart v. BofI Holding, Inc.*, 269 F. Supp. 3d 1059, 1085 (S.D. Cal. 2017)).

#### 24 **IV. DISCUSSION**

1 **A. LeDoux has sufficiently alleged an injury-in-fact, satisfying Article III standing.**

2 The Brand Defendants argue that LeDoux’s allegations regarding NDIs suffer a “fatal  
3 problem” in that they “fail to allege any adverse effect, injury, or damage resulting from her  
4 alleged exposure to NDIs[.]” Dkt. 62 at 2–3. They argue that LeDoux “asserts no palpable and  
5 distinct harm from her alleged exposure to NDIs.” *Id.* at 4. Accordingly, Defendants claim,  
6 LeDoux’s “allegations concerning NDIs fail to meet the requirements for Article III standing.”  
7 *Id.* Defendants do not address this argument in their reply. *See generally* Dkt. 85.

8 “[T]o satisfy Article III’s standing requirements, a plaintiff must show ‘injury in fact,’  
9 causation, and redressability.” *Friends of the Earth, Inc. v. Laidlaw Env’t Servs. (TOC), Inc.*, 528  
10 U.S. 167, 168 (2000) (citing *Lujan v. Defs. Of Wildlife*, 504 U.S. 555, 560–61 (1992)).  
11 Defendants do not challenge causation or redressability, only injury-in-fact. *See generally*  
12 Dkt. 62. An injury-in-fact must be concrete and particularized and actual or imminent, rather  
13 than merely conjectural or hypothetical. *Lujan*, 504 U.S. at 560. Although a plaintiff may not  
14 rely on a “bare legal conclusion to assert injury-in-fact . . . the threshold question of whether  
15 plaintiff has standing (and the court has jurisdiction) is distinct from the merits of his claim.”  
16 *Maya v. Centex Corp.*, 658 F.3d 1060, 1068 (9th Cir. 2011). As such, “general factual allegations  
17 of injury resulting from the defendant’s conduct may suffice.” *Id.*

18 Despite Defendants’ contentions, LeDoux alleges several injuries she suffered from  
19 exposure to the NDIs. *See* Dkt. 79 at 15–17. For example, LeDoux alleges that, had she been  
20 “truthfully informed” of the contents of the supplements, she would not have purchased or used  
21 the products. Dkt. 45 ¶ 98. In *Maya v. Centex Corporation*, the Ninth Circuit clarified that, where  
22 a plaintiff purchases something because of a defendants’ misrepresentations about the product—  
23 but would not have if the plaintiff had known the truth—the plaintiff has shown economic injury.  
24 658 F.3d at 1069. Such “[e]conomic injury is clearly a sufficient basis for standing.” *Id.* (quoting



1 *San Diego Cnty. Gun Rts. Comm. v. Reno*, 98 F.3d 1121, 1130 (9th Cir. 1996)); *see also Painters*  
 2 *& Allied Trades Dist. Council 82 Health Care Fund v. Takeda Pharms. Co.*, 796 F. App'x 919,  
 3 921 n.1 (9th Cir. 2019) (“We have held in the consumer fraud context that where plaintiffs  
 4 contend that they bought a product when they otherwise would not have done so, because  
 5 Defendants made deceptive claims and failed to disclose known risks[,] they have suffered an  
 6 injury in fact sufficient to support Article III standing.”) (cleaned up).

7 And several cases have found economic injury present where a plaintiff would not have  
 8 purchased a consumer product had the plaintiff known of an undisclosed ingredient. *Howard v.*  
 9 *Alchemee, LLC*, No. 2:24-CV-01834-SB-BFM, 2024 WL 4272931, at \*3 (C.D. Cal. Sept. 19,  
 10 2024) (benzene in skincare); *Barnes v. Nat. Organics, Inc.*, No. EDCV22314JGBPLAX, 2022  
 11 WL 4283779, at \*1 (C.D. Cal. Sept. 13, 2022) (prenatal vitamins containing heavy metals);  
 12 *Zeiger v. WellPet LLC*, 304 F. Supp. 3d 837, 846 (N.D. Cal. 2018) (lead, arsenic, and BPA in  
 13 dog food); *Maisel v. S.C. Johnson & Son, Inc.*, No. 21-CV-00413-TSH, 2021 WL 1788397, at \*3  
 14 (N.D. Cal. May 5, 2021) (plant-based dishwasher tablets); *Bohac v. Gen. Mills, Inc.*, No. 12-CV-  
 15 05280-WHO, 2014 WL 1266848, at \*10 (N.D. Cal. Mar. 26, 2014) (ingredients in cereal).

16 Thus, LeDoux has sufficiently alleged an injury-in-fact at this stage. The claims should  
 17 not be dismissed nor stricken.

18 **B. The Court need not decide the availability of punitive damages at this stage.**

19 Defendants also claim that LeDoux cannot assert punitive damages because her claims  
 20 are brought under the CPA and WPLA—statutes that do not allow for punitive damages. Dkt. 62  
 21 at 6. Thus, Defendants argue, the punitive damages claims should be dismissed. *Id.* In response,  
 22 LeDoux argues that the CPA does authorize “exemplary damages”—“‘treble’ damages upon  
 23 appropriate findings.” Dkt. 79 at 30 (first citing *McKee v. AT&T Corp.*, 164 Wn.2d 372, 401, 191  
 24 P.3d 845 (2008); and then citing *BBC Grp. NV LLC v. Island Life Rest. Grp. LLC*, No. C18-1011

1 RSM, 2020 WL 758070, at \*7 (W.D. Wash. Feb. 14, 2020)). And LeDoux argues that she is  
2 “entitled to pursue punitive damages under New York law, unless foreclosed under a conflict-of-  
3 laws analysis.” *Id.* In reply, Defendants maintain that Washington, not New York, law applies.  
4 Dkt. 85 at 6–7.

5 When “a federal court sits in diversity, it must look to the forum state’s choice of law  
6 rules to determine the controlling substantive law.” *Patton v. Cox*, 276 F.3d 493, 495 (9th Cir.  
7 2002) (citing *Klaxon Co. v. Stentor Elec. Mfg. Co.*, 313 U.S. 487, 496 (1941)); *see also Fields v.*  
8 *Legacy Health Sys.*, 413 F.3d 943, 950 (9th Cir. 2005) (same). LeDoux claims diversity  
9 jurisdiction. Dkt. 45 ¶ 10–11. Thus, the Court applies the choice-of-law rules of Washington in  
10 assessing the availability of punitive damages. *McCarthy v. Amazon.com, Inc.*, 679 F. Supp. 3d  
11 1058, 1067 (W.D. Wash. 2023) (citing *Downing v. Abercrombie & Fitch*, 265 F.3d 994, 1005  
12 (9th Cir. 2001)).

13 “Under Washington law, when parties dispute choice of law, there must be an actual  
14 conflict between the laws or interests of Washington and the laws or interests of another state  
15 before the court will engage in a conflict-of-laws analysis.” *Id.* (citing *Erwin v. Cotter Health*  
16 *Ctrs.*, 161 Wn.2d 676, 167 P.3d 1112 (2007)). An “actual conflict” exists where the result of a  
17 particular issue would be different under the law of the two states. *Id.* (citing *Erwin*, 161 Wn.2d  
18 at 1120). Absent an actual conflict, Washington law applies. *Id.*

19 If actual conflict exists, the Court applies the “most significant relationship” test. *Singh v.*  
20 *Edwards Lifesciences Corp.*, 151 Wn. App. 137, 143, 210 P.3d 337, 340 (2009). In determining  
21 which jurisdiction has the most significant relationship to a particular issue, which in this case is  
22 the availability of punitive damages, the Court first weighs “(a) the place where the injury  
23 occurred, (b) the place where the conduct causing the injury occurred, (c) the domicile,  
24 residence, nationality, place of incorporation and place of business of the parties, and (d) the

1 place where the relationship, if any, between the parties is centered.” *Singh*, 151 Wn. App. at  
2 143. If these contacts are balanced, the second step is to consider “the public policies and  
3 governmental interests of the concerned states.” *Id.* at 144.

4 LeDoux brings claims under both the Washington Consumer Protection Act (CPA) and  
5 the Washington Products Liability Act (WPLA). Dkt. 45. The Court starts with her CPA claims.  
6 A party injured by a CPA violation may recover actual damages and costs, including a  
7 reasonable attorney’s fee. RCW 19.86.090. Further, the court “may, in its discretion, increase the  
8 award of damages to an amount not more than three times the actual damages sustained,” subject  
9 to a statutory limit of \$25,000. *Id.* LeDoux requests “punitive damages to the full extent allowed  
10 by applicable law, in light of the principles and policies of Chapter 19.86 RCW and/or the  
11 substantive laws of New York[.]” Dkt. 45 at 44. She also requests “general and special  
12 damages[.]” *Id.* Because the CPA allows both actual and treble damages, this request need not be  
13 dismissed for LeDoux’s CPA claims.

14 Turning next to the WPLA claims, Plaintiff argues that although the WPLA does not  
15 allow for punitive damages, New York law (where the companies are citizens) should govern  
16 punitive damages. Dkt. 79 at 30. There is an actual conflict here: Washington generally prohibits  
17 punitive damages unless expressly authorized by statute—and the WPLA does not authorize  
18 punitive damages. *Id.* at 31; *Erickson v. Pharmacia LLC*, 31 Wn. App. 2d 100, 134, 548 P.3d  
19 226, review granted *sub nom. Erickson v. Pharmacia LLC*, 556 P.3d 1098 (Wash. 2024)  
20 (“Because WPLA has not expressly authorized punitive damages, they are not authorized for  
21 WPLA claims under Washington law.”). Thus, if Washington law applies, punitive damages are  
22 unavailable as a matter of law. But New York law authorizes punitive damages in product  
23 liability and fraud cases where the defendant’s conduct “evinces a high degree of moral  
24

1 culpability” or “shows a conscious disregard of the rights and safety of others.” Dkt. 79 at 31  
2 (quoting *Home Ins. Co. v. Am. Home Prods. Corp.*, 75 N.Y.2d 196, 203–04 (1990)).

3 Yet this is not a question that the Court needs to—or should—resolve at this stage. As a  
4 general matter, “the Washington State Supreme Court is wary to dismiss questions that turn on a  
5 choice of law at the Rule 12(b)(6) stage, as the analysis in a given case ‘depends upon the  
6 underlying facts of that case.’” *Aguirre v. Easy Automation, Inc.*, No. 4:24-CV-5040-TOR, 2024  
7 WL 4895703, at \*2 (E.D. Wash. Nov. 26, 2024) (citation omitted). LeDoux has not yet had the  
8 chance to engage in discovery about the location where the supplements were designed,  
9 manufactured, and distributed; the location where any NDIs or amphetamines were discovered;  
10 or the location of any potential decision not to warn consumers. *See generally* Dkt. 45.

11 Accordingly, “[b]ased on the allegations in the complaint alone, the court does not have  
12 sufficient information to make a determination one way or another which state has the most  
13 significant relationship to the issue of punitive damages.” *Farmer v. I-Flow Corp.*, No. C13-826  
14 RAJ, 2013 WL 12145954, at \*2 (W.D. Wash. Sept. 25, 2013). Thus, “[t]he Court reserves its  
15 judgment pending further development of the factual record.” *Davis v. Edgewell Pers. Care*  
16 *Brands, LLC*, No. 2:18-CV-00057-SAB, 2018 WL 1975685, at \*4 (E.D. Wash. Apr. 26, 2018)  
17 (similar).

18 Reserving judgment on choice of law is also prudent because the same issue is pending  
19 right now before the Washington Supreme Court. In *Erickson v. Pharmacia LLC*, a trial court  
20 allowed the jury to consider and award damages under Missouri law for a claim brought under  
21 the WPLA. 31 Wn. App. 2d at 132. Missouri law, like New York’s, allowed the plaintiffs to  
22 claim punitive damages. *Id.* (citing cases). The jury awarded punitive damages, and the  
23 defendants appealed. *Id.* at 109–10. The appeals court explained that “Washington courts have  
24 applied a separate choice-of-law analysis to the issue of punitive damages for tort claims,

analyzing” a different set of factors “to determine which state has the most significant interest.” *Id.* at 134 (citing cases). “In doing so, courts have sometimes engaged in dépeçage<sup>[1]</sup> and, after analyzing the issue of punitive damages, have determined that a different state’s law applies to punitive damages than to the underlying tort liability claim.” *Id.* Ultimately, the court concluded, “to the extent Missouri’s product liability law prohibits the same conduct as prohibited by WPLA, plaintiffs may seek punitive damages because Missouri has a more significant interest pursuant to an analysis of relevant contacts.” *Id.* at 137.

The defendant appealed, and the case is now before the Washington Supreme Court. *See Erickson v. Pharmacia LLC.*, 556 P.3d 1098 (Wash. 2024). In their briefing, the defendants argued that the court should vacate the punitive damages award because conflict-of-law principles demand the application of Washington’s punitive damages law. *Erickson v. Pharmacia LLC.*, 2022 WL 1480184, at \*4. When a federal court is deciding an issue of state law, it is “bound by the pronouncements of the state’s highest court on applicable state law.” *Ticknor v. Choice Hotels Int’l, Inc.*, 265 F.3d 931, 939 (9th Cir. 2001) (citing *Davis v. Metro Productions, Inc.*, 885 F.2d 515, 524 (9th Cir. 1989)); *Fid. Union Tr. Co. v. Field*, 311 U.S. 169, 177 (1940) (“The highest state court is the final authority on state law.”) (citations omitted). Given the likelihood of a binding forthcoming decision from the Washington Supreme Court, and that a motion to dismiss is not the proper vehicle to assess these claims, the Court DENIES Defendants’ motion as to punitive damages without prejudice.

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<sup>1</sup> A principle under which “different issues in a single case arising out of a common nucleus of facts may be decided according to the substantive law of different states.” *Erickson*, 31 Wn. App. 2d at 116 (quoting *FutureSelect Portfolio Mgmt. Inc. v. Tremont Grp. Holdings, Inc.*, 175 Wn. App. 840, 856 n.15, 309 P.3d 555 (2013)).

1 **C. The Court will not consider arguments raised for the first time in reply.**

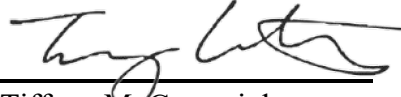
2 Lastly, Defendants raise a new argument in their reply, asserting that LeDoux's  
3 allegations regarding the NDIs should be stricken because they are no more than an attempt to  
4 enforce the Food and Drug Cosmetic Act (FDCA). Dkt. 85 at 3. Because the FDCA does not  
5 allow a private right of action to enforce its provisions, Defendants argue, any claims that sound  
6 in an FDCA violation are preempted and must be dismissed. *Id.* at 3–5.

7 The Court will not entertain this argument. “It is well established that new arguments and  
8 evidence presented for the first time in [r]epley are waived.” *California Expanded Metal Prods.*  
9 *Co. v. Klein*, 426 F. Supp. 3d 730, 743 (W.D. Wash. 2019) (quoting *DocuSign, Inc. v. Sertifi,*  
10 *Inc.*, 468 F. Supp. 2d 1305, 1307 (W.D. Wash. 2006)); *see also United States v. Patterson*, 230  
11 F.3d 1168, 1172 n.3 (9th Cir. 2000)) (refusing to consider new argument raised in reply) (citing  
12 cases).

13 **V. CONCLUSION**

14 For these reasons, the Motion to Dismiss, Dkt. 62, is DENIED.

15 Dated this 16th day of May, 2025.

16   
17 Tiffany M. Cartwright  
18 United States District Judge  
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